

**Before the  
Federal Communications Commission  
Washington, D.C.**

In the Matter of :	)	
	)	
Implementation of Section 304 of the	)	CS Docket No. 97-80
Telecommunications Act of 1996	)	
	)	
Commercial Availability of	)	
Navigation Devices	)	

**ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: April 14, 2003**

**Released: April 25, 2003**

**Comment Date: February 19, 2004**

**Reply Comment Date: March 10, 2004**

By the Commission: Commissioner Copps concurring and issuing a statement.

1. Section 629 of the Communications Act directs the Commission to adopt regulations to assure the commercial availability of navigation devices equipment<sup>1</sup> used by consumers to access services from multichannel video programming distributors ("MVPDs").<sup>2</sup> Pursuant to this directive, the Commission issued the *Report and Order* in the above-captioned proceeding establishing, *inter alia*, a January 1, 2005, deadline for MVPDs to cease deploying new navigation devices that perform both conditional access functions and other functions in a single integrated device.<sup>3</sup> The Commission adopted the requirement to separate the conditional access function from the basic navigation device (the "host device") in order to permit unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. The Commission later issued a *Further Notice of Proposed Rulemaking and Declaratory Ruling* ("Further Notice and Declaratory Ruling") that sought comment on the effectiveness of the Commission's navigation device rules, including the 2005 prohibition on integrated devices.<sup>4</sup>

2. Since Section 629 and the Commission's rules were adopted, the cable and consumer electronics industries have made, and continue to make, significant progress in the development of

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<sup>1</sup> Navigation devices are defined for purposes of this proceeding as "converter boxes, interactive equipment, and other equipment used by consumers within their premises to receive multichannel video programming and other services offered over multichannel video programming systems." 47 C.F.R. § 76.1201(c).

<sup>2</sup> 47 U.S.C. § 549.

<sup>3</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14793 (1998) ("*Navigation Devices Order*"); see 47 C.F.R. § 76.1204(a)(1).

<sup>4</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 15 FCC Rcd 18199, 18203 (2000) ("*Further Notice and Declaratory Ruling*").

technical standards in this area. However, the commercial market for navigation devices used in conjunction with the distribution of digital video programming remains in its infancy. In an effort to spur the transition to digital television, the cable and consumer electronics industry recently reached a Memorandum of Understanding (“MOU”) on a cable compatibility standard for a unidirectional digital cable television receiver with host device functionality, as well as other unidirectional digital cable products.<sup>5</sup> This standard would allow consumers to directly attach their DTV receivers to cable systems using a point of deployment (“POD”) module and receive one-way cable television services without the need for an external navigation device.<sup>6</sup> The Commission issued a *Further Notice of Proposed Rulemaking* (“FNPRM”) seeking public comment on the MOU issued in the above-captioned proceeding and in the *Compatibility Between Cable Systems and Consumer Electronics Equipment* proceeding.<sup>7</sup>

3. In its earlier *Further Notice and Declaratory Ruling*, the Commission had already sought comment, *inter alia*, on whether the 2005 date for the phase-out of integrated boxes remains appropriate, on what, if any, incentives the requirement creates for the development of a commercial retail market for navigation devices, and on the economic impacts and costs associated with the requirement.<sup>8</sup> In response, the cable industry and set-top box manufacturers generally urged that the 2005 deadline should be eliminated in favor of the continued offering of integrated navigation devices for rent to consumers.<sup>9</sup> Other equipment manufacturing and retail interests urged that the date should be advanced to ensure the timely development of a retail market in host devices.<sup>10</sup> Given the equipment ordering and manufacturing cycles involved, it is necessary at this point to provide guidance as to the Commission’s expectations with respect to the 2005 date. Other issues raised in the *Further Notice and Declaratory Ruling* will be addressed separately at a later time.

4. Commission action in response to the FNPRM could have a significant impact upon the development of a commercial market in separate host devices. In addition, the cable and consumer electronic industries are in the midst of negotiations on specifications for bidirectional digital cable receivers and products which would permit the receipt of advanced cable television services by direct connection to cable systems. This ongoing process, which we are hopeful will produce results in the near term, could impact the development of technical specifications relating to host devices and POD modules.

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<sup>5</sup> *Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers* (Dec. 19, 2002) (“Cable/Consumer Electronics MOU”).

<sup>6</sup> Due to the unidirectional nature of this receiver specification, an external navigation device will still be needed to receive advanced features such as cable operator-enhanced electronic programming guides (“EPGs”), impulse pay per view (“IPPV”) or video on demand (“VOD”). Cable/Consumer Electronics MOU at 4.

<sup>7</sup> Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment, *Further Notice of Proposed Rulemaking*, CS Docket 97-80 and PP Docket 00-67, FCC 0-3 (rel. Jan. 10, 2003).

<sup>8</sup> *Further Notice and Declaratory Ruling*, 15 FCC Rcd 18202-03.

<sup>9</sup> See e.g., Comments of the National Cable and Telecommunications Association in Response to *Further Notice of Proposed Rulemaking* at 35-41; Comments of Motorola, Inc. at 12-20; Letter from Neal Goldberg, General Counsel, NCTA, to Marlene Dortch, Secretary, FCC (Mar. 13, 2003); Letter from Jeanine Poltronieri, Motorola, to Magalie Roman Salas, Secretary, FCC (Dec. 19, 2001).

<sup>10</sup> See e.g., Comments of the Consumer Electronics Association at 16-25; Comments of Consumer Electronics Retailers Coalition at 6-18; Letter from Robert Schwartz, Consumer Electronics Retailers Association, to William F. Caton, Acting Secretary, FCC (Mar. 21, 2001) (“3/21/01 Schwartz Letter”).

In light of the ongoing notice and comment cycle relating to the *FNPRM*, the evolving nature of technical specifications relating to navigation devices, and the imminent business ordering and manufacturing cycles facing MVPDs and consumer electronics manufacturers in anticipation of the pending 2005 prohibition, we hereby extend the deadline concerning the prohibition on integrated devices until July 1, 2006.

5. This eighteen month extension should provide adequate time for the parties to complete their ongoing negotiations and for the Commission to make a more knowledgeable decision as to any further changes in the compliance date. By January 1, 2005, the Commission shall complete a reassessment of the state of the navigation devices market and determine whether the designated time frame remains appropriate or whether the ban on integrated devices will no longer be necessary. In the interim, the cable and consumer electronics industries are requested to provide the Commission with status reports on their negotiations on specifications for bidirectional digital cable receivers and products at 90, 180 and 270 day intervals following release of this Order. Following submission of the last status report to the Commission, the public shall have thirty days to submit comments on the status reports and whether any further changes in the phase-out date for integrated devices are warranted.

6. Based upon the record in the above-captioned proceeding and ongoing industry developments, we have concluded that a limited deferral of the date is consistent with the ultimate objectives of this proceeding and our statutory directive to act “in consultation with appropriate industry standard-setting organizations.”<sup>11</sup> We are not persuaded at this point to eliminate the prohibition on integrated devices since future developments in both the marketplace and ongoing industry negotiations may yet dictate a need for this requirement in order to achieve the objectives of Section 629. However, the conclusion of the unidirectional MOU, as well as the ongoing negotiations towards a bidirectional agreement, do reflect progress towards the development of a retail market for consumer electronics equipment with navigation device functionality. As such, we do not believe that advancing the prohibition date, as previously suggested by a number of equipment manufacturing and retail interests, is necessary to further these objectives or would provide sufficient lead time for ordering and manufacturing prior to completion of the next phase of the standardization process.<sup>12</sup>

7. *Authority.* This *Further Notice of Proposed Rulemaking* is issued pursuant to authority contained in §§ 4(i), 303(r), and 629 of the Communications Act of 1934, as amended.

8. *Ex Parte Rules – Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission’s Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

9. *Accessibility Information.* Accessible formats of this *Order and Further Notice of Proposed Rulemaking* (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at [bmillin@fcc.gov](mailto:bmillin@fcc.gov).

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<sup>11</sup> 47 U.S.C. § 549(a). Although the ongoing negotiations between the consumer electronics and cable industries are not being conducted under the auspices of a formal standards setting organization, any specifications resulting from such negotiations would be subject to subsequent review and adoption by an appropriate organization.

<sup>12</sup> *See* 3/21/01 Schwartz Letter at 6.

10. *Comment Information.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before **February 19, 2004**, and reply comments on or before **March 10, 2004**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

11. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

12. *Paperwork Reduction Act of 1995 Analysis.* The *Order* portion of this *Order and Further Notice of Proposed Rulemaking* does not contain information collection(s) subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. However, the *Further Notice* portion of this *Order and Further Notice of Proposed Rulemaking* contains modified information collection(s) subject to the PRA. It will be submitted to the Office of Management and Budget ("OMB") for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding.

13. Written comments by the public on the proposed information collection(s) are due 60 days from date of publication of this *Order and Further Notice of Proposed Rulemaking* in the Federal Register. Written comments must be submitted by the public, Office of Management and Budget and other interested parties on the proposed information collection(s) on or before 60 days from date of publication of this *Order and Further Notice of Proposed Rulemaking* in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judith Boley Herman, Federal Communications Commission, Room 1-C804, 445 12<sup>th</sup> Street, SW, Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov), and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17<sup>th</sup> Street, NW, Washington, DC 20503, or via the Internet to [Kim\\_A.\\_Johnson@omb.eop.gov](mailto:Kim_A._Johnson@omb.eop.gov).

14. *Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act,<sup>13</sup> the Commission has prepared an Final Regulatory Flexibility Analysis (“FRFA”) relating to the *Order* portion of this *Order and Further Notice of Proposed Rulemaking*. The FRFA is set forth in Appendix B. The Commission has also prepared an Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in *Further Notice* portion of this *Order and Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Further Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

15. **IT IS HEREBY ORDERED** that pursuant to the authority contained in Sections 4(i), 303(r), and 629 of the Communications Act of 1934, 47 U.S.C §§ 154(i), 303(r), and 549, that the Commission’s January 1, 2005, prohibition on integrated navigation devices contained in 47 C.F.R. § 76.1204(a)(1) **IS AMENDED** as set forth in Appendix A, and shall become effective 30 days after publication in the Federal Register.

16. **IT IS FURTHER ORDERED** that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Order and Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>13</sup> See 5 U.S.C. § 603.

**APPENDIX A**

Part 76 of the Code of Federal Regulations is amended as follows:

**PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE**

1. The authority for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 531, 571, 572, and 573.

2. Section 76.1204(a) is amended by revising paragraph (a)(1) to read as follows:

**§76.1204 Availability of equipment performing conditional access or security functions.**

(a)(1) A multichannel video programming distributor that utilizes navigation devices to perform conditional access functions shall make available equipment that incorporates only the conditional access functions of such devices. Commencing on July 1, 2006, no multichannel video programming distributor subject to this section shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device.

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## APPENDIX B

### FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")<sup>14</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Further Notice of Proposed Rulemaking and Declaratory Ruling* ("Further Notice and Declaratory Ruling").<sup>15</sup> The Commission sought written public comment on the proposals in the *Further Notice and Declaratory Ruling*, including comment on the IRFA. No comments were received on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.<sup>16</sup>

**A. Need for, and Objectives of, the Order.** Section 629 of the Communications Act of 1934, as amended, requires the Commission to develop rules to assure competitive availability of navigation devices used in conjunction with services provided by multichannel video programming distributors ("MVPDs").<sup>17</sup> The statutory objective of Section 629 is to assure that navigation devices used by consumers to access a particular MVPD's programming are available to consumers from manufacturers, retailers and other vendors not affiliated with that MVPD. To this end, the Commission adopted a January 1, 2005, deadline for MVPDs to cease deploying new navigation devices that perform both conditional access functions and other functions in a single integrated device.<sup>18</sup> Requiring MVPDs to separate the conditional access function from the basic navigation device (the "host device") was intended to permit unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. In the *Further Notice and Declaratory Ruling*, the Commission indicated that it would reassess the need for the 2005 separation deadline in light of the evolving marketplace for navigation devices. In response, the cable industry and set-top box manufacturers generally urged that the 2005 deadline should be eliminated in favor of the continued offering of integrated navigation devices for rent to consumers. Other equipment manufacturing and retail interests urged that the date should be advanced to ensure the timely development of a retail market in host devices. Since the *Further Notice and Declaratory Ruling* was issued, the cable and consumer electronics industries have reached a Memorandum of Understanding ("MOU") on a cable compatibility standard for a unidirectional digital cable television receiver with host device functionality, as well as other unidirectional digital cable products. This standard, which is the subject of a pending *Further Notice of Proposed Rulemaking* ("FNPRM"),<sup>19</sup> would allow consumers to

<sup>14</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>15</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 15 FCC Rcd 18199, 18215 (2000) ("Further Notice and Declaratory Ruling").

<sup>16</sup> See 5 U.S.C. § 604. Because our action merely extends the existing deadline for MVPDs to cease issuing integrated navigation devices, we also certify this *Order* under 5 U.S.C. § 605.

<sup>17</sup> 47 U.S.C. § 549.

<sup>18</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14793 (1998) ("Navigation Devices Order"); see 47 C.F.R. § 76.1204(a)(1).

<sup>19</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment, Further Notice of Proposed Rulemaking*, CS Docket 97-80 and PP Docket 00-67, FCC 0-3 (rel. Jan. 10, 2003).

directly attach their DTV receivers to cable systems using a point of deployment ("POD") module and receive one-way cable television services without the need for an external navigation device. The cable and consumer electronic industries are also in the midst of negotiations on specifications for bidirectional digital cable receivers and products which would permit the receipt of advanced cable television services by direct connection to cable systems. This ongoing process, which may produce results in the near term, could impact the development of technical specifications relating to host devices and POD modules. In light of the ongoing notice and comment cycle relating to the *FNPRM*, the evolving nature of technical specifications relating to navigation devices, and the imminent business ordering and manufacturing cycles facing MVPDs and consumer electronics manufacturers in anticipation of the pending 2005 prohibition, the present *Order* extends the prohibition on integrated devices until July 1, 2006. This limited deferral of the prohibition date is consistent with the ultimate objectives of this proceeding and our statutory directive to act "in consultation with appropriate industry standard-setting organizations."<sup>20</sup>

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA.** There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

**C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply.** The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.<sup>21</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>22</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>23</sup> A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").<sup>24</sup>

**Cable and Other Program Distribution.** The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating \$12.5 million or less in revenue annually.<sup>25</sup> This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, multipoint distribution

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<sup>20</sup> 47 U.S.C. § 549(a). Although the ongoing negotiations between the consumer electronics and cable industries are not being conducted under the auspices of a formal standards setting organization, any specifications resulting from such negotiations would be subject to subsequent review and adoption by an appropriate organization.

<sup>21</sup> 5 U.S.C. § 603(b)(3).

<sup>22</sup> 5 U.S.C. § 601(6).

<sup>23</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to the 5 U.S.C. § 601(3), the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such the term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>24</sup> 15 U.S.C. § 632.

<sup>25</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220). This NAICS code applies to all services listed in this paragraph.



services ("MDS"), multichannel multipoint distribution service ("MMDS"), Instructional Television Fixed Service ("ITFS"), local multipoint distribution service ("LMDS"), satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). According to the Census Bureau data, there are 1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than \$10 million in revenue.<sup>26</sup> We address below each service individually to provide a more precise estimate of small entities.

**Cable Operators.** The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>27</sup> We last estimated that there were 1,439 cable operators that qualified as small cable companies.<sup>28</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by our action.

The Communications Act, as amended, also contains a size standard for a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>29</sup> The Commission has determined that there are 68,500,000 subscribers in the United States. Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>30</sup> Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450.<sup>31</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

**Direct Broadcast Satellite ("DBS") Service.** Because DBS provides subscription services, DBS falls within the SBA-recognized definition of cable and other program distribution services.<sup>32</sup> This

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<sup>26</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>27</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd. 7393 (1995).

<sup>28</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>29</sup> 47 U.S.C. § 543(m)(2).

<sup>30</sup> 47 C.F.R. § 76.1403(b).

<sup>31</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>32</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220).

definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>33</sup> There are four licensees of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees that are operational have annual revenues that may be in excess of the threshold for a small business.<sup>34</sup> The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge, despite the absence of specific data on this point, that there are entrants in this field that may not yet have generated \$12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

**Home Satellite Dish ("HSD") Service.** Because HSD provides subscription services, HSD falls within the SBA-recognized definition of cable and other program distribution services.<sup>35</sup> This definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>36</sup> The market for HSD service is difficult to quantify.<sup>37</sup> Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled.<sup>38</sup> HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.<sup>39</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220).

<sup>36</sup> *Id.*

<sup>37</sup> *See*, however, the census data for Cable and Other Program Distribution, *supra*.

<sup>38</sup> *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 12 FCC Rcd 4358, 4385 (1996) ("*Third Annual Report*").

<sup>39</sup> *Id.* at 4385.

**Multipoint Distribution Service (“MDS”), Multichannel Multipoint Distribution Service (“MMDS”) Instructional Television Fixed Service (“ITFS”) and Local Multipoint Distribution Service (“LMDS”).** MMDS systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the MDS and ITFS.<sup>40</sup> LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>41</sup>

In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>42</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>43</sup> The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. As noted, the SBA has developed a definition of small entities for pay television services, which includes all such companies generating \$12.5 million or less in annual receipts.<sup>44</sup> This definition includes multipoint distribution services, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$12.5 million annually. Therefore, for purposes of this analysis, we find there are approximately 850 small MDS providers as defined by the SBA and the Commission’s auction rules.

The SBA definition of small entities for cable and other program distribution services, which includes such companies generating \$12.5 million in annual receipts, seems reasonably applicable to ITFS.<sup>45</sup> There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business.<sup>46</sup> However, we do not collect annual revenue data for ITFS licensees, and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

Additionally, the auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined “small entity” for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>47</sup> An additional classification

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<sup>40</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 10 FCC Rcd at 9589, 9593 (1995) (“*ITFS Order*”).

<sup>41</sup> *See Local Multipoint Distribution Service*, 12 FCC Rcd 12545 (1997) (“*LMDS Order*”).

<sup>42</sup> 47 C.F.R. § 21.961(b)(1).

<sup>43</sup> *See ITFS Order*, 10 FCC Rcd at 9589.

<sup>44</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220).

<sup>45</sup> *Id.*

<sup>46</sup> SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601(5).

<sup>47</sup> *See LMDS Order*, 12 FCC Rcd at 12545.

for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding calendar years.<sup>48</sup> These regulations defining “small entity” in the context of LMDS auctions have been approved by the SBA.<sup>49</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission’s auction rules.

**Satellite Master Antenna Television ("SMATV") Systems.** The SBA definition of small entities for cable and other program distribution services includes SMATV services and, thus, small entities are defined as all such companies generating \$12.5 million or less in annual receipts.<sup>50</sup> Industry sources estimate that approximately 5,200 SMATV operators were providing service as of December 1995.<sup>51</sup> Other estimates indicate that SMATV operators serve approximately 1.5 million residential subscribers as of July 2001.<sup>52</sup> The best available estimates indicate that the largest SMATV operators serve between 15,000 and 55,000 subscribers each. Most SMATV operators serve approximately 3,000-4,000 customers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities.

**Open Video Systems (“OVS”).** Because OVS operators provide subscription services,<sup>53</sup> OVS falls within the SBA-recognized definition of cable and other program distribution services.<sup>54</sup> This definition provides that a small entity is one with \$ 12.5 million or less in annual receipts.<sup>55</sup> The Commission has certified 25 OVS operators with some now providing service. Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City,

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<sup>48</sup> *Id.*

<sup>49</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

<sup>50</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220).

<sup>51</sup> See *Third Annual Report*, 12 FCC Rcd at 4403-4.

<sup>52</sup> See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1281 (2001) (“*Eighth Annual Report*”).

<sup>53</sup> See 47 U.S.C. § 573.

<sup>54</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220).

<sup>55</sup> *Id.*

Boston, Washington, D.C. and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

**Electronics Equipment Manufacturers.** Rules adopted in this proceeding could apply to manufacturers of DTV receiving equipment and other types of consumer electronics equipment. The SBA has developed definitions of small entity for manufacturers of audio and video equipment<sup>56</sup> as well as radio and television broadcasting and wireless communications equipment.<sup>57</sup> These categories both include all such companies employing 750 or fewer employees. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will utilize the SBA definitions applicable to manufacturers of audio and visual equipment and radio and television broadcasting and wireless communications equipment, since these are the two closest NAICS Codes applicable to the consumer electronics equipment manufacturing industry. However, these NAICS categories are broad and specific figures are not available as to how many of these establishments manufacture consumer equipment. According to the SBA's regulations, an audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.<sup>58</sup> Census Bureau data indicates that there are 554 U.S. establishments that manufacture audio and visual equipment, and that 542 of these establishments have fewer than 500 employees and would be classified as small entities.<sup>59</sup> The remaining 12 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. Under the SBA's regulations, a radio and television broadcasting and wireless communications equipment manufacturer must also have 750 or fewer employees in order to qualify as a small business concern.<sup>60</sup> Census Bureau data indicates that there 1,215 U.S. establishments that manufacture radio and television broadcasting and wireless communications equipment, and that 1,150 of these establishments have fewer than 500 employees and would be classified as small entities.<sup>61</sup> The remaining 65 establishments have 500 or more employees; however, we are unable to determine how

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<sup>56</sup> 13 CFR § 121.201, NAICS code 334310.

<sup>57</sup> 13 CFR § 121.201, NAICS code 334220.

<sup>58</sup> 13 CFR § 121.201, NAICS code 334310.

<sup>59</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Industry Series – Manufacturing, Audio and Video Equipment Manufacturing, Table 4 at 9 (1999). The amount of 500 employees was used to estimate the number of small business firms because the relevant Census categories stopped at 499 employees and began at 500 employees. No category for 750 employees existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>60</sup> 13 C.F.R. § 121.201, NAICS code 334220.

<sup>61</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Industry Series – Manufacturing, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, Table 4 at 9 (1999). The amount of 500 employees was used to estimate the number of small business firms because the relevant Census categories stopped at 499 employees and began at 500 employees. No category for 750 employees existed. Thus, the number is as accurate as it is possible to calculate with the available information.

many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. We therefore conclude that there are no more than 542 small manufacturers of audio and visual electronics equipment and no more than 1,150 small manufacturers of radio and television broadcasting and wireless communications equipment for consumer/household use.

**D. Description of Projected Reporting, Recordkeeping and other Compliance Requirements.** The amended rule does not impose any additional reporting or recordkeeping requirements. To the extent that compliance may require the manufacture and purchase of non-integrated host devices by multichannel video programming distributors (“MVPDs”) by July 1, 2006, the present action does not impose any new requirements on consumer electronics equipment manufacturers or MVPDs, but rather extends the existing compliance date by eighteen months. We believe that the resulting impact on small entities is favorable to the extent that it provides them with additional time to come into compliance with the prohibition on integrated devices.

**E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>62</sup>

To the extent that compliance with the amended prohibition deadline may require the manufacture and purchase of non-integrated host devices by multichannel video programming distributors (“MVPDs”) by July 1, 2006, the present action does not impose any new requirements on consumer electronics equipment manufacturers or MVPDs, but rather extends the existing compliance date by eighteen months. We believe that the resulting impact on small entities is favorable to the extent that it provides them with additional time to come into compliance with the prohibition on integrated devices. When the original prohibition deadline was adopted, we noted, *inter alia*, that Section 629 includes provisions which may lessen compliance impact on small entities, including Section 629(c), which specifies that the Commission shall waive its implementing regulations when necessary for an MVPD to develop new or improved services, and Section 629(e), which requires the Commission to sunset its implementing rules when certain conditions are met.<sup>63</sup>

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<sup>62</sup> 5 U.S.C. § 603(b).

<sup>63</sup> *Navigation Devices Order*, 13 FCC Rcd at 14842.

**Report to Congress:** The Commission will send a copy of the *Order and Further Notice of Proposed Rulemaking* (“*Order and Further Notice*”), including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>64</sup> In addition, the Commission will send a copy of the *Order and Further Notice*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order and Further Notice* and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>65</sup>

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<sup>64</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>65</sup> See 5 U.S.C. § 604(b).

## APPENDIX C

### INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")<sup>66</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking* portion of this item. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice of Proposed Rulemaking* portion of this item provided in paragraph 10-11. The Commission will send a copy of this entire *Order and Further Notice of Proposed Rulemaking* ("Order and Further Notice"), including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").<sup>67</sup> In addition, the *Further Notice of Proposed Rulemaking* portion of this item and the IRFA (or summaries thereof) will be published in the Federal Register.<sup>68</sup>

**A. Need for, and Objectives of, the Proposed Rules.** The *Order* portion of this *Order and Further Notice* extends by eighteen months the Commission's existing January 1, 2005, deadline for MVPDs to cease deploying new navigation devices that perform both conditional access functions and other functions in a single integrated device. The need for, and objectives, of this action are explained in the Final Regulatory Flexibility Analysis ("FRFA") accompanying this *Order and Further Notice*. In the *Further Notice* portion of this *Order and Further Notice*, we extend our review of the development of the commercial availability of navigation devices in light of ongoing industry negotiations which may affect the technical specifications relating to navigation devices. Our objective is to seek comment on the appropriateness of the new July 1, 2006 ban on integrated devices based upon the status of these negotiations. This objective is commensurate with our statutory directive in Section 629 of the Communications Act of 1934, as amended, to act "in consultation with appropriate industry standard-setting organizations" to assure the commercial availability of navigation devices used in conjunction with services provided by multichannel video programming distributors ("MVPDs").<sup>69</sup>

**B. Legal Basis.** The authority for this proposed rulemaking is contained in Sections 4(i), 303(r), and 629 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 549.

**C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply.** The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.<sup>70</sup> The RFA generally

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<sup>66</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>67</sup> See 5 U.S.C. § 603(a).

<sup>68</sup> See 5 U.S.C. § 603(a).

<sup>69</sup> 47 U.S.C. § 549(a). Although the ongoing negotiations between the consumer electronics and cable industries are not being conducted under the auspices of a formal standards setting organization, any specifications resulting from such negotiations would be subject to subsequent review and adoption by an appropriate organization.

<sup>70</sup> 5 U.S.C. § 603(b)(3).



defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>71</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>72</sup> A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").<sup>73</sup>

**Cable and Other Program Distribution.** The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating \$12.5 million or less in revenue annually.<sup>74</sup> This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, multipoint distribution services ("MDS"), multichannel multipoint distribution service ("MMDS"), Instructional Television Fixed Service ("ITFS"), local multipoint distribution service ("LMDS"), satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). According to the Census Bureau data, there are 1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than \$10 million in revenue.<sup>75</sup> We address below each service individually to provide a more precise estimate of small entities.

**Cable Operators.** The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>76</sup> We last estimated that there were 1,439 cable operators that qualified as small cable companies.<sup>77</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules proposed in this *Further Notice*.

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<sup>71</sup> 5 U.S.C. § 601(6).

<sup>72</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to the 5 U.S.C. § 601(3), the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such the term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>73</sup> 15 U.S.C. § 632.

<sup>74</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220). This NAICS code applies to all services listed in this paragraph.

<sup>75</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>76</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd. 7393 (1995).

<sup>77</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

The Communications Act, as amended, also contains a size standard for a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>78</sup> The Commission has determined that there are 68,500,000 subscribers in the United States. Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>79</sup> Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450.<sup>80</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

**Direct Broadcast Satellite ("DBS") Service.** Because DBS provides subscription services, DBS falls within the SBA-recognized definition of cable and other program distribution services.<sup>81</sup> This definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>82</sup> There are four licensees of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees that are operational have annual revenues that may be in excess of the threshold for a small business.<sup>83</sup> The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge, despite the absence of specific data on this point, that there are entrants in this field that may not yet have generated \$12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

**Home Satellite Dish ("HSD") Service.** Because HSD provides subscription services, HSD falls within the SBA-recognized definition of cable and other program distribution services.<sup>84</sup> This definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>85</sup> The market for HSD service is difficult to quantify.<sup>86</sup> Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and

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<sup>78</sup> 47 U.S.C. § 543(m)(2).

<sup>79</sup> 47 C.F.R. § 76.1403(b).

<sup>80</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>81</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220).

<sup>85</sup> *Id.*

<sup>86</sup> *See, however, the census data for Cable and Other Program Distribution, supra.*

approximately 150 are unscrambled.<sup>87</sup> HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.<sup>88</sup>

**Multipoint Distribution Service (“MDS”), Multichannel Multipoint Distribution Service (“MMDS”) Instructional Television Fixed Service (“ITFS”) and Local Multipoint Distribution Service (“LMDS”).** MMDS systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the MDS and ITFS.<sup>89</sup> LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>90</sup>

In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>91</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>92</sup> The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. As noted, the SBA has developed a definition of small entities for pay television services, which includes all such companies generating \$12.5 million or less in annual receipts.<sup>93</sup> This definition includes multipoint distribution services, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$12.5 million annually. Therefore, for purposes of the IRFA, we find there are approximately 850 small MDS providers as defined by the SBA and the Commission’s auction rules.

The SBA definition of small entities for cable and other program distribution services, which includes such companies generating \$12.5 million in annual receipts, seems reasonably applicable to ITFS.<sup>94</sup> There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational

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<sup>87</sup> *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 12 FCC Rcd 4358, 4385 (1996) (“*Third Annual Report*”).

<sup>88</sup> *Id.* at 4385.

<sup>89</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 10 FCC Rcd at 9589, 9593 (1995) (“*ITFS Order*”).

<sup>90</sup> *See Local Multipoint Distribution Service*, 12 FCC Rcd 12545 (1997) (“*LMDS Order*”).

<sup>91</sup> 47 C.F.R. § 21.961(b)(1).

<sup>92</sup> *See ITFS Order*, 10 FCC Rcd at 9589.

<sup>93</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220).

<sup>94</sup> *Id.*

institutions. Educational institutions are included in the definition of a small business.<sup>95</sup> However, we do not collect annual revenue data for ITFS licensees, and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

Additionally, the auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined “small entity” for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>96</sup> An additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding calendar years.<sup>97</sup> These regulations defining “small entity” in the context of LMDS auctions have been approved by the SBA.<sup>98</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission’s auction rules.

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<sup>95</sup> SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601(5).

<sup>96</sup> See *LMDS Order*, 12 FCC Rcd at 12545.

<sup>97</sup> *Id.*

<sup>98</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

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**Electronics Equipment Manufacturers.** Rules adopted in this proceeding could apply to manufacturers of DTV receiving equipment and other types of consumer electronics equipment. The SBA has developed definitions of small entity for manufacturers of audio and video equipment<sup>105</sup> as well as radio and television broadcasting and wireless communications equipment.<sup>106</sup> These categories both include all such companies employing 750 or fewer employees. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will utilize the SBA definitions applicable to manufacturers of audio and visual equipment and radio and television broadcasting and wireless communications equipment, since these are the two closest NAICS Codes applicable to the consumer electronics equipment manufacturing industry. However, these NAICS categories are broad and specific figures are not available as to how many of these establishments manufacture consumer equipment. According to the SBA’s regulations, an audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.<sup>107</sup> Census Bureau data indicates that there are 554 U.S. establishments that manufacture audio and visual equipment, and that 542 of these establishments have fewer than 500 employees and would be classified as small entities.<sup>108</sup> The remaining 12 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. Under the SBA’s regulations, a radio and television broadcasting and wireless communications equipment manufacturer must also have 750 or fewer employees in order to

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<sup>102</sup> See 47 U.S.C. § 573.

<sup>103</sup> 13 C.F.R. § 121.201, NAICS code 517510 (formerly 513220).

<sup>104</sup> *Id.*

<sup>105</sup> 13 CFR § 121.201, NAICS code 334310.

<sup>106</sup> 13 CFR § 121.201, NAICS code 334220.

<sup>107</sup> 13 CFR § 121.201, NAICS code 334310.

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qualify as a small business concern.<sup>109</sup> Census Bureau data indicates that there 1,215 U.S. establishments that manufacture radio and television broadcasting and wireless communications equipment, and that 1,150 of these establishments have fewer than 500 employees and would be classified as small entities.<sup>110</sup>

The remaining 65 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. We therefore conclude that there are no more than 542 small manufacturers of audio and visual electronics equipment and no more than 1,150 small manufacturers of radio and television broadcasting and wireless communications equipment for consumer/household use.

**D. Description of Projected Reporting, Recordkeeping and other Compliance Requirements.** At this time, it is not expected that the proposed actions will require any additional recordkeeping or compliance requirements. We seek comment on whether others perceive a need for recordkeeping.

**E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>111</sup>

We have sought comment on the appropriateness of the July 1, 2006 prohibition on integrated navigation devices in light of, *inter alia*, ongoing developments regarding this industry. As a part of this effort, we wish to consider and examine the effect of changing or eliminating the prohibition deadline on small entities. We welcome comments suggesting ways in which any perceived burden upon small entities could be mitigated.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.** None.

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<sup>109</sup> 13 C.F.R. § 121.201, NAICS code 334220.

<sup>110</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Industry Series – Manufacturing, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, Table 4 at 9 (1999). The amount of 500 employees was used to estimate the number of small business firms because the relevant Census categories stopped at 499 employees and began at 500 employees. No category for 750 employees existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>111</sup> 5 U.S.C. § 603(b).

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: Implementation of Section 304 of the Telecommunications Act of 1996, Commercial  
Availability of Navigation Devices, CS Docket No. 97-80*

Starting from the premise that consumers are better served by having more choices and options, I am concerned about any extension that delays the commercial availability of set-top boxes. Nevertheless, I concur in the decision to extend the January 1, 2005 deadline for MVPDs to stop deploying integrated set-top boxes, rather than to eliminate the requirement altogether. Given recent and ongoing industry developments, not extending the deadline at this time would have forced consumers in the short-term to lease costlier devices or purchase technology that will likely become obsolete once the industry works out the remaining details on bi-directional cable compatibility.

I would have preferred a shorter extension period that would have kept more pressure on the Commission and the industry to ensure that competitive navigational devices are made commercially available as soon as possible, as the statute requires. The Commission must continue to do all it can to keep the DTV transition moving forward expeditiously.

It is important to note that the Commission will revisit this issue again in 18 months. While I would have liked to do so before then, I do believe the Commission, as well as the Congress, will be expecting great further progress on the road toward the exciting new world of digital television for which we have been waiting too long.